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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-25

CHRISTOS STAMAS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GEORGE P. JEFFREYS
44 Lee Street
Lowell, Massachusetts 01852

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No.

CHRISTOS STAMAS,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Christos Stamas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this case on June 4, 1971.

Opinion Below

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A hereto (p. 13, below).

Jurisdiction

The Judgment of the Court of Appeals for the First Circuit was entered on June 4, 1971, and is set forth in Appendix B hereto (p. 18, below). The jurisdiction of the Supreme Court is invoked under 28 U.S. c. 1254 (1).

Questions Presented

1. Whether the doctrine of entrapment requires the government to have reasonable grounds to suspect that the defendant is guilty of illegal conduct before it begins a focused attempt to induce his commission of a crime.

2. Whether, where the government solicits the commission of a crime, the defense of entrapment should have prevailed as a matter of law where the only evidence of the defendant's predisposition to commit the federal crime was his willingness to do so.

3. Whether the closing argument of the government attorney referring to irrelevant matter not in evidence to bolster the uncorroborated testimony of the sole government witness was prejudicial and plain error.

Statute Involved

The pertinent statutory provision involved, namely the Gun Control Act of 1968, 18 U.S. c. 922 (a)(5) (Supp. V, 1970) provides in relevant part:

> "(a) it shall be unlawful..."
>
> (5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or

licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides . . . ."

Statement of the Case

Petitioner, a Massachusetts resident, was convicted of the unlawful sale of a firearm in violation of 18 U.S.C. Section 922 (a)(5) on the basis of a single sale of a derringer to a government agent, Lindquist, a special investigator for the Alcohol, Tobacco, and Firearm Division of the Treasury Department assigned to duty at its Portland, Maine office and a resident of Maine.

The factual issues in dispute were (1) whether the petitioner knew of the agent's Maine residency and (2) the question of entrapment. Following a jury trial, in which the Court instructed on the question of entrapment, a conviction was returned and an eighteen (18) month sentence to prison imposed. (Appendix C hereto, p. 19 below)

The essential facts came solely from the uncorroborated testimony of Lindquist and the testimony of the petitioner who admitted the sale.

Lindquist testified:

On April 7, 1969, he was introduced to the petitioner at the Gaslite Cafe where petitioner was employed as from Revere, Massachusetts by an "informant".

On April 8, 1969, again at the cafe, Lindquist in the presence of the informant asked the petitioner "if there were any guns, machine guns for sale". Petitioner replied "that he didn't have any but that he would make a phone call to a man to see if there were any around". He told Lindquist to call him the next day.

On April 10, 1969, Lindquist returned to the cafe and told the petitioner

> "I would like to buy a couple of hand guns. I told him I could buy them quite easily in Maine where I resided but I had a criminal record, and I didn't want my name to appear on the dealers records, so I didn't want to buy them from a dealer".

He explained that he used to be a resident of Revere, but since moving to Maine he had no connections in Maine. The petitioner told Lindquist

> "that guns came in and out of the Gaslite and if I happened to be there at a time when some guns were in, he'd sell them to me".

Petitioner further stated that he was still trying to get the machine guns which Lindquist had requested but he'd had no luck.

On April 14, Lindquist returned to the cafe. Petitioner was not there. As a result of a conversation with another employee, about guns, Lindquist was told that the petitioner had a derringer. When petitioner arrived, Lindquist approached the petitioner and requested to purchase the derringer. After some discussion about the price, Lindquist purchased the derringer for $45.00.

Petitioner testified:

Lindquist approached him several times to obtain guns. Because Lindquist was a good spender, he told him he would try to get him guns but in fact did nothing to procure one for him. After several requests he told Lindquist:

> "Look, leave me alone, I can't get you any heavies, can't get you anything. My business is to sell whiskey not to sell guns."

The derringer which was sold on April 14, 1969 was being held for collateral for a $20.00 loan and was sold to Lindquist at his request upon assumption that Lindquist and the other employee who told Lindquist about the gun had spoken to the owner relative to its sale. Petitioner also stated that he was unaware that Lindquist resided in Maine.

There was no testimony by the informant nor did Lindquist testify as to what information, if any, he had received to cause him to approach the petitioner for guns.

There was no evidence of any other sale nor of the petitioner's prior or subsequent connection with guns or gun traffic.

There was no evidence received of any prior illegal or criminal conduct of the petitioner or of his general reputation.

In his final argument the defendant's attorney stated:

> "Really, what this case involves is perhaps the heart of this problem, the reason we are here, why it is a federal case: Whether or not the defendant had knowledge that this man, Mr. Lindquist, was not from Massachusetts; that he was in fact from Maine. If Mr. Lindquist had not stated that he was from Maine, then this case wouldn't be here. It would have been sent to the State Court. This is the problem. That's what you have to determine.

In his final argument the government attorney stated:

> "And now defense counsel argues that were it not for that particular fact, we would not be here. He says we will be in the State Court, and I agree. We would not be here. We would be in the State Court. And

here is the point that I think you should bear in mind in determining whether or not Agent Lindquist is telling the truth or the defendant is telling the truth. I would ask you: Put yourself in the place of the government and ask yourself this question: Assuming that Mr. Stamas sold this particular gun to another person and all the other elements on that, what difference does it make if he's prosecuted here or in the State Court in Lowell? what difference does it make. We prosecute him here only because he sold to a person he had reason to believe or actually knew was from another state. If he sold to a person who lived in Massachusetts, he'd be prosecuted in the State Court.

So why would Agent Lindquist come in here and say that he told the defendant he was from Maine if it were not so? The defendant would be prosecuted in any event, would he not? Does it make any difference that we are here or that it could have been there simply because Mr. Lindquist lived in Maine or lived in Massachusetts?

The important thing is that a gun was sold, and the defendant would have been prosecuted in one place or the other. So I ask you keep that in mind and ask yourselves why would Agent Lindquist say he told him he was from Maine if he didn't, because it certainly didn't make any difference where he was going to be prosecuted. The point is there would be a prosecution."

No objection was taken and the judge gave no initial instruction on the relevancy of any possible state proceeding to the offense charged or to the credibility of either testimony.

After starting its deliberation the jury asked: *What*

would be the state offense if it were not interstate? The Court with the consent of both counsel instructed the jury to disregard all reference to possible state prosecution in reaching their verdict.

Reasons for Granting the Writ

I. THE CONFLICT OF THE DECISIONS OF THE COURTS OF APPEALS.

A. *The following Circuit Courts adopt the position that no prior suspicions are required to warrant police initiation of their activity to induce the commission of the crime.*

First : *Kadis* v. *United States*, 373 F.2d 370 (1967)

Second : *United States* v. *Abdallah*, 149 F.2d 219 (1945) cert. denied 326 U.S. 724

Fourth : *Newman* v. *United States*, 299 F.2d 128 (1924)

Ninth : *Silva* v. *United States*, 212 F.2d 422 (1954)

B. *The following Circuit Courts adhere to the position that the doctrine of entrapment requires reasonable suspicion of the defendant's predisposition to commit the crime, or substantially similar crimes, prior to the initiation of the police inducement.*

D. C. : *Childs* v. *United States*, 267 F.2d 619, 105 U.S. app. D.C. 342 (1958) cert. denied 359 U.S. 370

Fifth : *Weathers* v. *United States*, 126 F.2d 118 (1942)

Eighth : *Swallum* v. *United States,* 39 F.2d 390 (1930)

Tenth : *Heath* v. *United States,* 169 F.2d 1007 (1948)

II. The Importance of the Issue to the Administration of Criminal Justice.

Since the last definitive statement of the Court on the question of entrapment in *Sherman* v. *United States,* 356 U.S. 369 (1958), there has been much controversy as to the reach and scope of the doctrine. The guidelines established therein and in the progenitor case of *Sorrells* v. *United States,* 287 U.S. 435 (1932) have been applied with increasing difficulty. *See Lopez* v. *United States,* 373 U.S. 427 (1963). The all-but-weekly writings from the Circuits on the subject have led both judges and writers to call out for a reassessment of the doctrine. New directions from the Court are needed on the issue in its supervisory authority over the administration of criminal justice in the federal courts. *See Robison* v. *United States,* 379 F.2d 338, at 346 (9th Cir. 1967), judgment vacated 390 U.S. 198; Rotenberg, *The Police Detection Practice of Encouragement,* 49 Va. L. Rev. 871; *The Constitutional Status of the Entrapment Defense,* 74 Yale L. J. 942.

III. The Conflict With the Decisions of This Court:

A. *It is per se improper to offer inducement without prior good reason to suspect guilt.*

In view of the direct conflict of decisions there is no occasion to develop at this stage the argument showing that the position adopted by the First Circuit is erroneous. In

brief, however, it is submitted that the underpinnings of entrapment rest on a firm constitutional foundation and its constitutional basis is made abundantly clear by *Cox* v. *Louisiana,* 379 U.S. 559. (1965). The policies of the fourth amendment which limit governmental power to search for crime must place a corresponding limit on governmental power to induce it. The requirement of reasonable suspicion qualifies the right of police to solicit crime no less than to detect it. In *Sorrells* v. *United States,* 287 U.S. 435, 441 the Court stressed the lack of reasonable cause to believe the defendant was engaged in criminal conduct, and in *Sherman* v. *U. S.,* 356 U.S. 369, 372, the Court specifically equated entrapment with unlawful search and seizure, saying that where entrapment is made out "stealth and strategy become as objectionable police methods as coerced confession and the unlawful search."

B. *It is improper, as a matter of law, for a jury to infer a course of criminal conduct or criminal design from the very fact of a successful solicitation of an innocent man.*

Disregarding all testimony not favorable to the prosecution we have a simple case. A man, theretofore innocent of wrong doing, is easily persuaded by a government agent to do an act which a criminal statute makes a crime. The record is devoid of evidence that would indicate that before the government agent conceived the plan of persuasion the petitioner was other than an innocent man. No previous criminal record, no evidence of a course of criminal conduct or reputation evidence was submitted to prove the petitioner's criminal design.

Is "ready compliance" or willingness by an otherwise

innocent man in and of itself sufficient to sustain the government's burden of showing the defendant's predisposition to commit the crime charged?

It is submitted that the degree of persuasion, or contrariwise the petitioner's willingness, is not significant where the approach is made to an apparently innocent man. The conduct of the government agent afforded the petitioner more than just the oportunity to commit the crime. The solicitation created or manufactured the federal crime. The gravamen of the crime was not the sale but the sale to a non resident, the design of said crime being induced by the government agent without any evidence as to the petitioner's predisposition to violate the statute.

C. *The insufficiency of the evidence to establish "non-entrapment" is reviewable error.*

Notwithstanding defendant's failure to preserve his rights to appellate review by appropriate objection or motion, the Court may notice plain errors or defects affecting substantial rights to prevent a manifest miscarriage of justice. *Silber* v. *United States,* 370 U.S. 717 (1962). The plain error doctrine recognizes the need to mitigate in criminal cases the harsh effect of a rigid application of the adversary method of trial whereby the attorney's conduct binds his client. 8A *Moore's Federal Practice* 52.02 (1970).

Further, Rule 29(a) F.R.C.P. requires the Court to enter a judgment of acquittal of *its own motion* if the evidence is insufficient to sustain a conviction. The Court need not wait for a motion of acquittal by the defendant. Failure to comply with this rule is error of law that is fully reviewable aside from appellate review under the "plain

error'' doctrine. *Hall* v. *United States,* 286 F.2d 676 (5th Cir. 1961).

IV. The Closing Argument of the Government Attorney Referring to Irrelevant Matter Not In Evidence to Bolster the Credibility of the Uncorroborated Testimony of the Sole Government Witness Was Prejudicial and Plain Error.

It is elementary that counsel may not premise argument on evidence which has not been admitted. *Johnson* v. *United States,* 347 F.2d 803 (DC CA 1965). There was no evidence that petitioner had violated or committed a state crime. Yet, the government agent's credibility was anchored to that fact. Where the central overriding issue in the trial was the credibility of the petitioner as against the government agent, this highly prejudicial argument can not be called harmless. There is a reasonable possibility that this argument might have contributed to the conviction. *Fahy* v. *Connecticut,* 375 U.S. 85 (1963).

The question of the jury clearly indicates that the argument struck home. The supplemental instruction did not relate itself to the improper bolstering of the agent's credibility. Law enforcement officials wear an invisible cloak of credibility by virtue of their position. To use prejudicial argument to further support their credibility may easily tip the scale heavily against the defendant.

While a broader, more to the point, supplemental charge would have been more appropriate, it is likely that the situation as it existed was such that no admonition or further charge could remove from the jury's mind the effect of the improper remarks of counsel. *Kotteakos* v. *United States,* 328 U.S. 750 (1946).

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

George P. Jeffreys
44 Lee Street
Lowell, Massachusetts 01852
Tel. 617-454-1225

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1002

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHRISTOS STAMAS,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

George P. Jeffreys for appellant.
Lawrence P. Cohen, Assistant United States Attorney, with whom *Herbert F. Travers, Jr.*, United States Attorney, was on brief, for appellee.

June 4, 1971.

McENTEE, *Circuit Judge*. Defendant, a Massachusetts resident, was convicted by a jury of selling a firearm to a person he knew to be an out-of-state resident, in violation of the Gun Control Act of 1968, 18 U.S.C. § 922 (a)(5) (Supp. V, 1970).* The sale was made to Govern-

* 18 U.S.C. § 922(a) provides in relevant part:
"(a) It shall be unlawful —
". . .
"(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides . . . ."

ment Agent Lindquist, a Maine resident, at a bar in Lowell, Massachusetts, where defendant was employed. Defendant made no objections at trial relating to any of the matters at issue on this appeal, nor did he move for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. Inasmuch as he also failed to make timely post-trial motions for acquittal or a new trial pursuant to Fed. R. Crim. P. 29(c) and 33, the standard of review on appeal is plain error. Fed. R. Crim. P. 52(b); *Silber* v. *United States*, 370 U.S. 717 (1962); *Dichner* v. *United States*, 348 F.2d 167 (1st Cir. 1965).

Defendant's initial contention is that there was insufficient evidence for the jury to conclude that he knew Lindquist came from Maine. Indeed, Lindquist testified that he was initially introduced to defendant as Stanley Clark from Revere, Massachusetts. However, Lindquist also testified that he later told defendant that he used to reside in Revere but was now living in Maine, and the jury was certainly entitled to believe that testimony.

It is next contended that Lindquist's actions constituted entrapment as a matter of law. Defendant testified that, after Lindquist had asked him to sell him a "heavy" (a gun) on five or six occasions, he finally said, "Look, leave me alone. I can't get you any heavies, can't get you anything. My business is to sell whiskey not to sell guns." Defendant stated that, after that, Lindquist continued to approach him about selling a gun through a fellow employee who acted as Lindquist's intermediary. Since this testimony was clearly "some evidence tending to show unreadiness," it warranted a jury instruction on entrapment, *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967), and a proper instruction was given by the trial court at defendant's request. The government's witness, Lindquist, specifically contradicted defendant's testimony and portrayed defendant as ready and willing at

all times to make a sale as soon as a gun became available and Lindquist was ready to meet defendant's price. Whether or not, therefore, the government met its burden of proving predisposition was a jury question. *United States* v. *Rodrigues,* 433 F.2d 760 (1st Cir. 1970); *cf. Sherman* v. *United States,* 356 U.S. 369, 373 (1958).

Next, defendant objects to certain evidence adduced by the prosecutor on cross-examination. Defendant had testified on direct examination that he first learned Lindquist was from Maine when he saw a complaint against him at the Lowell Police Department signed by Kenneth Lindquist of Portland, Maine. On cross-examination the prosecutor asked him whether that complaint involved a gun case, and defendant answered that it did not. The question was unnecessary and served only to inform the jury that defendant had been in trouble with the Lowell police in connection with an unrelated matter. We note, however, that the prosecutor made no further reference to this evidence and that Lindquist's testimony throughout the trial was consistent and convincing. The evidence in question was not so virulent, nor the case so weak, that the error could not have been cured by an instruction from the trial judge, had a proper objection been made. *United States* v. *Cotter,* 425 F.2d 450, 453 (1st Cir. 1970); *cf. Odom* v. *United States,* 377 F.2d 853, 859-60 (5th Cir. 1967).

In his closing argument, counsel for defendant stated that the crucial question in the case was whether defendant knew Lindquist was from Maine, emphasizing that, if defendant reasonably believed Lindquist to be from Massachusetts, he could be convicted in state court but not in federal court. In response, the prosecutor told the jury:

> "Put yourself in the place of the government and ask yourself this question: Assuming that Mr. Stamas sold

> this particular gun to another person and all the other elements on that [sic], what difference does it make if he's prosecuted here or in the State Court in Lowell? What difference does it make? We prosecute him here only because he sold to a person he had reason to believe or actually knew was from another state. If he sold to a person who lived in Massachusetts, he'd be prosecuted in the State Court."

This argument was in effect an attempt by the government to bolster its case by appealing to the credibility that a jury normally accords to a public official. We have previously held that an attempt by a prosecutor to "lay his own credibility on the line" is improper in light of Rule 15 of the Canons of Professional Ethics of the American Bar Association. *Patriarca* v. *United States*, 402 F.2d 314, 320-21 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022 (1969). However, this statement was considerably milder than those made in *Patriarca* and, if objected to, could easily have been remedied by an instruction from the trial judge. *United States* v. *Cotter, supra.*

Defendant complains that he was denied his right to a speedy trial because the government waited six months after the offense was committed before indicting him. He argues that, in a case such as this where the government obtains all the relevant evidence on the date the crime is committed, a six-month delay should raise a presumption of prejudice since the defendant, not knowing he is going to be indicted, is likely to forget details about the events in question that are necessary for a proper defense. We have refused to adopt a presumption of prejudice arising from the mere passage of time in a post-indictment context, *United States* v. *DeLeo*, 422 F.2d 487, 494 (1st Cir.), *cert. denied*, 397 U.S. 1037. (1970), and we reject it in this context as well. In a case such as this, a six-month delay might be justified, for example, by the government's need

to investigate other suspected criminal activity on the part of this defendant and his associates. We therefore hold that in the pre-indictment context a defendant must also show either "improper motivation on the government's part or that he has been prejudiced" in order to succeed on a speedy trial claim. *See United States* v. *DeCosta*, 435 F.2d 630, 632 (1st Cir. 1970); *United States* v. *Frost*, 431 F.2d 1249 (1st Cir. 1970), *cert. denied*, 401 U.S. 916 (1971). In the instant case defendant has alleged neither; and there is no evidence on the record to support defendant's vague suggestion that his memory of the events in question may have been impaired by the six-month delay. *Cf. Ross* v. *United States*, 349 F.2d 210 (D.C. Cir. 1965).

Finally, defendant contends that he was denied effective assistance of counsel because his trial counsel failed to object to the two prosecution statements discussed *supra* and to move for acquittal or a new trial. On this question the "test is whether counsel's actions were so incompetent as to shock the conscience of the reviewing court." *Allen* v. *VanCantfort*, 436 F.2d 625, 630 (1st Cir.), *cert. denied* 6/1/71. We note that counsel at trial conducted a vigorous defense of his client by presenting evidence that defendant did not know Lindquist was from Maine and by effectively raising the issue of entrapment for consideration by the jury. There were no grounds for a motion for acquittal and, while counsel failed to object to two statements made by the prosecution, those remarks were not egregious.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1002

UNITED STATES OF AMERICA
APPELLEE,

v.

CHRISTOS STAMAS,
DEFENDANT, APPELLANT

JUDGMENT
Entered June 4, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

(s) DANA H. GALLUP
Clerk

Enter:
(s) ALDRICH, CH. J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. Criminal 70-253-J

UNITED STATES OF AMERICA

v.

CHRISTOS STAMAS

On this 21st day of December, 1970 came the attorney for the government and the defendant appeared in person and by Efthemios Bentas, Counsel.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a finding of Guilty has been convicted of the offense of being a person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, did sell a firearm, namely a Rohm, doubled-barreled, 38 caliber derringer, serial number 62451, to Kenneth G. Lindquist of Portland in the District of Maine, who was not a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, said Christos Stamas at that time knowing and having reasonable cause to believe that the said Kenneth G. Lindquist resided in the State and District of Maine, a State other than the Commonwealth of Massachusetts, in which the said Christos Stamas at the time resided; in violation of 18 U.S.C. § 922(a)(5) as charged in a One-Count Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of eighteen (18) months. Execution of sentence is stayed until Monday, January 11, 1971, at 12 Noon.

(s) ANTHONY JULIAN
United States District Court